SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1096

MRS. MATTIE L. SMITH,

vs. *Appellant,*

JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF COMMISSIONERS OF ROADS AND REVENUES, J. E. BARROW, CLARENCE HENDERSON, AND SCHOOL DISTRICT NO. 2 OF JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF TRUSTEES, F. T. MCELREATH, W. D. EVANS, S. W. OVERSTREET AND J. W. FUTRAL, AND T. H. RIVERS AS TAX COLLECTOR OF JEFFERSON COUNTY, GEORGIA, AND JAMES HUBBARD AS SHERIFF OF JEFFERSON COUNTY, GEORGIA, *Appellees*

STATEMENT AS TO JURISDICTION

This was a suit brought in the Superior Court of Jefferson County, Georgia, by appellant who was a non-resident, seeking to cancel certain deeds made by the taxing authorities of that county, in which said petition appellant asserted claims under the 14th Amendment of the Constitution of the United States to the effect that her property was being taken without due process of law, and that she was denied the equal protection of law as provided in the said 14th

Amendment. For instance, in sub-paragraph (c) of paragraph 10 of her original petition she alleged that:

> "Petitioner was a non-resident of the State of Georgia at the time and did not know of said levy and sale, and that not having returned the same for taxation for 1927, under Section 92-8103 of the Code of Georgia, Annotated, the same should have been advertised for 90 days in the official gazette, if rental or hiring would not produce the taxes; the sale thereof having been advertised in the NEWS & FARMER, the official gazette of said county, only once a week for four weeks during the month of June 1928, to-wit: June 7th, 14th., 21st., and 28th., 1928; said advertisement being for sale on the first Tuesday in July, 1928, as the property of M. B. Smith, whereas, 'said Sheriff's deed recites' that the land ' "was sold on the 9th day of July, 1928 (an illegal sales day); the first Tuesday in July, 1928, having fallen on July 2;" ' and in sub-paragraph (1) of said paragraph 10 she alleges that 'the taking of petitioner's said property under said tax deed was without due process of law, and in violation of the Constitution of the United States.' "

And after the lower court had directed a verdict in favor of appellees she again urged her claim of right under the 14th Amendment of the Constitution of the United States in her motion for a new trial as will be seen by reference thereto ground 5, sub-paragraph (f):

> "Taking Movants property under said tax deeds is without due process of law, and in violation of the Constitution of the United States, embodied in Section 1-805, 'No person shall be deprived of property without due process of law' and in Section 1-815, 'Nor shall any State deprive any person . . . of property without due process of law.' "

And thereafter appellant further urged her claim to rights guaranteed under the 14th Amendment of the Con-

stitution of the United States in a motion for a rehearing before the Supreme Court of Georgia after it had rendered its decision in this case as follows:

> "Movant also respectfully insists that the Court fell into error in deciding as a matter of law that the Movant did not have her property taken away from her without due process of law in violation of the 14th Amendment of the Constitution of the United States, when it appeared from the record that Movant was a non-resident of the State of Georgia, and the undisputed facts show that this property was not advertised in accordance with the law in order to sell the property of a non-resident,—the record showing that the advertisement ran for only five weeks when the law required that it should have been advertised for a period of 90 days; and certainly to take Movant's property without selling the same according to law, would be to take it without due process of law. Moreover, the undisputed record also shows that the deed in the record shows that it was sold on an illegal sale's day, to wit, the 9th day of July, 1928, when the legal sale's day was on July 2, 1928. So it will be seen from the record as Movant insists that the sale of her property was without regard to her rights, and in fraud, and without any notice as provided by law."

Appellant, therefore, insists that there was a bona fide claim asserted under the 14th Amendment of the Constitution of the United States, which was decided against her, and that this Court has jurisdiction on this appeal by reason of that fact, and in pursuance of paragraph (b) of Section 344 of U. S. Code and Section 237 of the Judicial Code, which provides that this Court has jurisdiction "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution."

Appellant further insists that there is a substantial Federal question involved similar to that involved in the

case of *Henry W. O'Neill* vs. *Jacob W. Leamer,* 239 U. S. 244, 60th Law Ed., wherein it was held,

> "A contention that an appropriation of land for a drainage district was essentially for a private purpose, and hence contrary to U. S. Const., 14th Amend., as amounting to a deprivation of property without due process of law, presents a Federal question which will support a writ of error from the Federal Supreme Court to a state court, where the latter court denied the right so asserted."

It is, therefore, respectfully submitted that this Court has jurisdiction of this case on appeal.

Attached hereto as Exhibit A is a copy of the decision rendered in said cause.

Respectfully submitted,

BENJ. E. PIERCE,
Attorney for Appellant.

EXHIBIT "A"

SUPREME COURT OF GEORGIA

No. 15601

SMITH

v.

JEFFERSON COUNTY et al.

Decided November 14, 1946

By the Court:

1. A deed properly executed by a sheriff pursuant to a sale under a tax execution, even if void for any reason, is such color of title as will support prescription by seven years' adverse possession.

2. The judgment under review was demanded by the pleadings and the evidence, and the assignments of error do not require the grant of a new trial.

On July 11, 1944, Mrs. Mattie L. Smith filed her equitable petition against Jefferson County, School District No. 2 of such county; T. H. Rivers, tax collector, and James Hubbard, sheriff, both of Jefferson County. She alleged: On June 4, 1928, she was the owner of two adjoining, described lots in the City of Wadley (Jefferson County) containing one and one-half acres, of the value of $4000. On that date a deputy sheriff of Jefferson County, without any effort to subdivide or sell a portion of the one-and-one-half acre tract, levied a tax execution thereon against M. B. Salter, issued by the tax collector of Jefferson County, in the sum of $22.20, for State, county and school taxes for the year 1927. The tax execution, entry of levy, and disbursement of funds received at the sale, as shown by the entry of the execution, are set out in full. The levy, as alleged, was grossly excessive, fraudulent, and void. On July 9, 1928, D. C. Thomas, sheriff, executed a deed to Jefferson County. The deed, which is set out in full, recites: the levy of an execution issued against M. B. Smith for 1927 State, county, and school taxes, by M. A. Evans, tax collector; advertisement

in the News & Farmer, the newspaper in the county in which sheriff's advertisements are published; the sheriff's proceeding on July 9, the same being a day for the sale of the property according to law; the exposure of the property for sale before the courthouse door, and its being knocked off to Jefferson County for $40.

The plaintiff alleged that the deed to Jefferson County is void because: (a) the levy was excessive and void; (b) the execution issued against M. B. Salter, who was never the owner of the land; (c) the plaintiff was a non-resident, and the property should have been advertised for ninety days, under the Code, § 92-8103; (d) the notice required by the Code, §§ 92-6212 and 92-6213, had not been given her; (e) the advertisement did not set forth the amount of the tax assessed; (f) the property was advertised as the property of M. B. Smith; (g) the plaintiff's taxes on the property were paid; (h) the property could have been rented out and taxes, if due, paid from the rents; (i) the execution failed to state that the property was unreturned; (j) the property was not pointed out by the plaintiff; (k) no notice of a tax assessment for the years 1927 and 1928 was ever given the plaintiff; (l) the taking of the plaintiff's property under such tax deed was without due process of law and in violation of the constitution of the United States (Code, §§ 1-805, 1-815).

The plaintiff charged: That a warrant on the treasurer for costs in connection with the sale has not been drawn as required. On January 1, 1930, a deed by the commissioners of roads and revenues of Jefferson County, purporting to convey the lands to School District No. 2 of the county, was made and later recorded. "On the first Wednesday in November, 1929, when petitioner's husband learned of a purported sale of her land by said sheriff, he, with Judge W. L. Phillips, an attorney, appeared before said board of commissioners and offered to pay and tendered all taxes, interests, costs or other lawful charges against said one-and-one-half-acre tract, and to redeem said land, which payment they refused to accept." The deed to School District No. 2 is void because: (a) the county had no title to convey; (b) no resolution was passed by the board authorizing the execution of the deed; (c) no commissioner

was appointed to sell the land. The tract was vacant land, and immediately after her discovery of the two deeds she, through her attorney, had a fence erected around the land. Her attorney was arrested and the fence torn down. The deeds are a cloud on the plaintiff's title. The defendant trustees, by telling prospective lessees that they owned the lands, have prevented her from leasing them since January 1, 1930, causing her to lose $100 per annum since that time. In addition to loss of rental, the trustees have continuously trespassed upon her lands, and she is entitled to damages, including punitive damages, of $5000, certain expenses of $650, and attorney's fees of $490. The plaintiff has paid all taxes assessed against her; she offers and has offered to do equity, and renews such offer to pay all legitimate taxes due as fixed by the court. She prayed that the defendants be enjoined and restrained from changing the status of the property, that the deeds to Jefferson County and the School District be declared void and cancelled, for process, and for the recovery of damages alleged.

The defendants filed their answer, denying the material allegations of the petition, but admitting the execution of the deed to the trustees of school district No. 2, as alleged, and that certain named persons were officers of the defendant county and district. The defendants filed an amendment to their answer, alleging that the school district, in order to protect its title, had to pay to the City of Wadley a paving assessment of $836.53, bearing interest from July 1, 1927, at 7 per cent per annum. The plaintiff demurred to the amendment. Her demurrer was overruled, she excepted pendente lite, and error is assigned in the bill of exceptions on the pendente lite exceptions.

On the trial of the case, after evidence had been introduced, the court directed a verdict for the defendants. The plaintiff filed a motion for new trial, which, after amendment, was overruled. Error is assigned on the judgment overruling the motion for new trial as amended.

The brief of the oral and documentary evidence covers 57 pages. Much of it was not relevant to the issues made. The evidence showed that the plaintiff, Mrs. Smith, had acquired the full title to one of the lots (included in the deed made by the sheriff as a result of the tax sale) in 1920,

and that she had acquired title to the other lot in 1925. She never at any time returned either lot for taxation, and never received any notice of assessment by the tax receiver. She heard a rumor in October, 1929, that certain persons at Wadley had obtained her lots for $22.20 taxes. She had been renting the lots for $75 annual rental, and made a contract for $100 for the year 1930, but the lessee advised her by letter that he could not take possession according to the agreement because officials of the county advised him that the property was owned by the county.

The tax deed made by the sheriff to Jefferson County was introduced in evidence, as was the fi. fa. described in the plaintiff's petition. The tax digest was introduced, showing that the plaintiff did not make a tax return for the year 1927. The defendants introduced the digest, showing that M. B. Smith made tax returns beginning with the year 1920 and continuing through the year 1934. Smith's returns in the 83rd district (City of Wadley) for the years 1926 through 1929 were for $600, being the amount of the assessment against the land claimed by the plaintiff. A copy of the official advertisement in the News & Farmer (official organ of Jefferson County) showed that the advertisement appeared in four issues immediately preceding the first Tuesday in July (July 2). The deed from Jefferson County to School District No. 2 was introduced.

There was much evidence for the defendant school district showing that the lots had been graded and used as a playground for the school children after it was acquired by the district. The plaintiff testified that she did not know of the sale of her lots until August, 1942. This testimony was contrary to the allegations of her petition that she had notice from a person to whom she had leased the lots in 1930, and the further allegation that her husband learned of the sale and went before the county board of commissioners to redeem the property in 1929. Both the plaintiff and her husband contended that her taxes for the year 1927 were paid to D. C. Thomas, the sheriff, by check. Records and testimony were introduced by the defendant to show that there was no record of Thomas (since deceased) having received such a check. Smith's testimony that the check was exhibited to the county commissioners was disputed

by persons who were members of the board at the time of the meeting.

The defendants offered in evidence minutes of the county commissioners' meeting in January, 1930, showing a sale of the Smith property to School District No. 2, and also offered evidence of the assessment made against M. B. Smith for paving done by the City of Wadley, and the acts authorizing such paving. The defendants introduced in evidence a judgment rendered in the District Court of the United States on October 11, 1943, in an action by the plaintiff against the same defendants and involving the same property, wherein it is recited in part as follows: "It appears that Mr. M. B. Smith, the husband of the petitioner, and her agent in handling this matter from the beginning, saw some lawyers about recovering the property from the authorities of Jefferson County more than ten or twelve years ago, and that one of these lawyers informed him that he had waited too late and was barred by the statute of limitations."

HEAD, *Justice:*

(After stating the foregoing facts.)

1. "Where land is sold under an execution based upon a void judgment, no title passes. But the purchaser at such sale holding the sheriff's deed has color of title; and if in good faith he enters into possession and holds the land adversely for seven years, he has a good title by prescription." Rogers v. Smith, 146 Ga. 373. The same rule applies to a tax sale by a sheriff. In the present case the tax collector testified that the records in his office showed that an execution for the year 1927 issued against M. B. Smith, and that the record contained a notation that the property had been sold to the county. The plaintiff contends that the execution accompanying the tax deed on the deed records was issued against M. B. Salter. There was evidence which would have authorized the finding that the name on the execution was erroneously entered at the time of recording. But even should it be assumed that the plaintiff's contention was correct, and that such execution amounted to no execution at all, it was held in Peeples v.

Wilson, 140 Ga. 610, that: "A sheriff's deed to land, executed to one who purchases at a tax sale, though not accompanied by the tax fi. fa. under which the land was sold, is good as color of title." (See also authorities cited.) And in Wood v. Wilson, 145 Ga. 259, with reference to a sale by a sheriff under a tax execution, it was held: "Though the sheriff's deed be void as title, it is good as color of title, and prescription by seven-years' adverse possession of the land may be predicated upon it, if the defendant's possession did not originate in fraud."

It appears without dispute that the county board of commissioners of roads and revenues, after the time had passed for the plaintiff to redeem the property, conveyed it to the school district in 1930. Was the possession by the school authorities adverse to the plaintiff for the more than fifteen years after the execution of such deed? The allegations of the plaintiff's petition conclusively establish such possession. She alleges in one instance that "defendant trustees telling prospective lessees that they were the owners of said property . . . prevented petitioner from leasing same since Jan. 1, 1930, thereby causing her a loss of over $100 per annum since that time;" and in another paragraph she alleges that "the trustees . . . have willfully and wantonly and continuously trespassed upon said land of petitioner, and been in the possession thereof, except a short time in 1934, a short time in 1937, and a short time in 1942, when plaintiff was in possession of same, since January 1, 1930," for which she asks damages. Since the plaintiff does not undertake to state any fact or circumstance to show what her short possession in 1934, 1937, and 1942 consisted of, such allegation is a mere conclusion, and does not overcome her allegation that the trustees have been continuously in possession since 1930. Under the averments of her petition, the only time that she did anything to evidence possession was in 1942, when she attempted to have a fence constructed around the lots, and then she alleges that the person in charge of such work was arrested and the fence torn down at the instance of claimants to the property. Certainly, under the allegations of the petition, the plaintiff fails to show any acts of possession since 1930. The undisputed testimony for the defendants shows improve-

ment and grading of the property, and use by the teachers, children, and school authorities since 1930.

"Actual possession of lands is evidenced by inclosure, cultivation, or any use and occupation thereof which is so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another." Code, § 85-403. Under the allegations of the petition, the plaintiff's attention was attracted to the use of the lands by the school authorities in 1930, and her only attempt to evidence possession was resisted with sufficient force to prevent her occupation of the lands, even temporarily. It follows that the school authorities at least acquired title by prescription under color of title, unless possession was acquired by fraud. " 'The fraud meant by the Code, in declaring that possession in order to be the foundation of prescription must not originate therein, is actual, moral fraud, a wrongful act, and not an act which the law denominates a fraud regardless of the bona fides of the parties.' " Connell v. Culpepper, 111 Ga. 805. Did the possession of the school authorities originate in fraud? No such wrongful act as to the school authorities is alleged, nor is there any evidence of any such acts in the record.

By holding that the school authorities acquired title by prescription under color of title prior to the filing of the present action, we do not intend to infer that the deed made by the sheriff to Jefferson County is necessarily void. Under decisions of this court in State v. Hancock, 79 Ga. 801, Barnes v. Lewis, 98 Ga. 559, and Dawson v. Dawson, 106 Ga. 45, a contrary ruling would appear to be authorized. The assumption that the sheriff's deed was void, however, is the most favorable position possible to the plaintiff, and under it she can not recover, the defendants having acquired title by prescription under their deed.

2. The exceptions pendente lite, which assign error on the allowance of an amendment by the defendants, pleading a paving assessment against M. B. Smith due the City of Wadley, and alleged to have been paid by the defendants to protect their title, do not show any reversible error. The title which the defendant school district acquired under their deed and by prescription was in no way dependent

on such paving assessment, if due and paid as alleged. The court did not err in allowing the amendment, which might have been germane as a claim for equitable setoff, had the plaintiff recovered in her action for the property.

The Code, § 32-909, providing that county boards of education shall have power to control the property of school districts, necessarily means that such districts may receive property for such county boards of education. The contention that local trustees could not be the owners of the property in question is therefore without merit.

Grounds of the motion for new trial as amended, contending that the court should have charged the jury certain principles of law, and that it was error to direct a verdict for the defendants for certain reasons assigned, are controlled, adversely to the plaintiff's contentions, by the rulings heretofore stated sustaining such verdict.

Judgment affirmed. All the Justices concur.

Filed in office. Jan. 24, 1947. Henry H. Cobb, D. C. S. C. Ga.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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Appellant,

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Appellees

MOTION TO DISMISS AND MOTION TO AFFIRM

JAMES M. HULL,
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Appellees

MOTION TO DISMISS AND MOTION TO AFFIRM

And now come the appellees and move the Court to dismiss the appeal filed herein, and move the Court to affirm the judgment of the Supreme Court of Georgia, and for cause show:

1. No real or substantial federal question is presented, but the same is made fictitiously only by bare averments in the pleadings.

2. The decision by the State Court was made under general principles and state statutes without the necessity of reference to any federal question. The opinion of the State Court contains no suggestions of any decision of any federal question.

3. The decision turns on construction of a state statute.

4. The record contains facts which abundantly support the State Court decision, and the Supreme Court of the United States will not review findings of fact by the State Court.

5. The decision by the State Court is manifestly correct, and the suggestion of the federal question is frivolous.

The following decisions of the Supreme Court of the United States are in point: In *King* v. *West Virginia,* 216 United States, page 92, 54 L. Ed., page 396, this court dismissed an appeal from a State Court decision upholding forfeiture by the state of land for failure to return for taxes for five years. In the second headnote it is pointed out that a question of fact is involved, and that there is therefore no basis for writ of error from the State Court decision. In the fourth headnote this court holds that misconstruction by the State Court of a state statute can not present a question for review by this court.

The case at bar is essentially a case turning upon title to lands by prescription. In *Donahue* v. *Vosper,* 243 United States, page 59, 61 L. Ed., page 592(3), this language is used: "Whether or not a person has acquired title by adverse possession to lands conveyed by the United States to a state in aid of railway construction is essentially a local question involving an appreciation of the evidence as to the conduct of the parties and is not open to review in the Federal Supreme Court on writ of error to a State Court."

In *Elder* v. *Wood*, 208 United States, 226, 52 L. Ed., page 464(2), this court holds: "The question of the validity under the due process of law clause of the United States Constitution Fourteenth Amendment of a tax sale made upon a notice published only in a Sunday newspaper, is not open on a writ of error from the Supreme Court of the United States to the highest court of a State, whose decision upholding the tax title was based upon the ground that a state statute made the tax deed, which, upon its face, was a valid instrument, *prima facie* evidence of the sufficiency of the notice, and that possession under such deed for the prescribed period met the requirements of the state statute of limitations."

The Court uses this language: "The decision, therefore, did not reach the only federal question which can be imagined with respect to this part of the case, namely, that a sale upon such a notice was wanting in due process of law, but rested upon entirely adequate grounds for a non federal nature."

WHEREFORE, appellees respectfully move that the appeal be dismissed and that the decision of the Supreme Court of Georgia be affirmed.

JAMES M. HULL,
A. L. BRYANT,
W. WRIGHT ABBOT,
Counsel for Appellees.

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First Nat'l Bk. Bldg.,
Louisville, Georgia.

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Appellees

PETITION ON REHEARING FOR ALLOWANCE OF WRIT OF CERTIORARI TO REVIEW FINAL JUDGMENT OF THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT OF PETITION.

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Appellees

PETITION ON REHEARING FOR ALLOWANCE OF WRIT OF CERTIORARI TO REVIEW FINAL JUDGMENT OF THE SUPREME COURT OF GEORGIA.

The petition of Mrs. Mattie L. Smith to the Supreme Court of the United States for rehearing for allowance of writ of certiorari to review final judgment of the Supreme Court of Georgia respectfully shows as follows:

I

On March 31, 1947, this Honorable Court entered its order granting the motion of the appellees to dismiss, for

lack of jurisdiction, the appeal allowed by the Supreme Court of Georgia, but this Court, in the said order, treated the papers whereon the appeal was allowed as a petition for the writ of certiorari, as required by Sec. 237(c) of the Judicial Code, as amended, 28 U. S. C., Sec. 344(c), and thereupon denied certiorari.

Based upon the application of petitioner, Mr. Justice Black entered an order, dated April 25, 1947, extending the time to and including May 20, 1947, within which to file a petition for rehearing in the above-entitled cause. Accordingly, this petition is filed for such rehearing, petitioner hereby invoking the jurisdiction of this Honorable Court to grant the writ of certiorari under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 938, Title 28, U. S. C. A. Sec. 347(a).

II

This equity suit was tried before the Court and a jury in said Superior Court of Jefferson County, Georgia, and after all the evidence was introduced by the parties, the Court directed the jury to render a verdict in favor of the defendants (Transcript, pp. 144, 151), upon which judgment was entered (Transcript, p. 145), after the overruling of petitioner's motion for a new trial (Transcript, pp. 28, 31, 67, 146). An appeal was taken to the Supreme Court of Georgia, the highest Court of the State, which affirmed the judgment of the trial Court (Transcript, pp. 172-3). Motion of petitioner for a rehearing was denied (Transcript, pp. 174, 195).

Question Presented

The trial Court, giving a peremptory instruction to the jury to render their verdict in favor of the defendants, upon which judgment was entered, and the Supreme Court

of Georgia, in affirming the judgment, such rulings were erroneously based upon the ground that where a deed executed by a sheriff, pursuant to a sale under a tax execution, *even if void for any reason, is such color of title as will support prescription by seven years' adverse possession* (Transcript, pp. 164, 169, 170).

III

Ruling of the Supreme Court of Georgia Violates Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Briefly stated, petitioner respectfully insists (1) that the decision and judgment of the Supreme Court of Georgia in this case, which deprived petitioner of her real estate, are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, such Federal right having been set up by petitioner from the beginning of her suit in the trial court (Transcript, p. 8), as well as in the Supreme Court of Georgia (Transcript, pp. 198, 250); and (2) that the said decision and judgment of the Supreme Court of Georgia, involving such Federal right of substance, are not in accord with applicable decisions of this Honorable Court, as set forth in the Brief of petitioner, hereto attached.

IV

Summary of the Case

On July 11, 1944, petitioner, a non-resident of Georgia, filed her suit in equity in the Superior Court of Jefferson County, Georgia, against Jefferson County, through its Board of Commissioners of Roads and Revenues, J. E. Barrow, Clarence Henderson, and School District No. 2 of said County, through its Board of Trustees, F. T. McElreath, W. D. Evans, S. W. Overstreet and J. W. Futral,

T. H. Rivers as Tax Collector of said County, and James Hubbard as Sheriff of said County, *to cancel two certain deeds,* and for other relief (Transcript, 1-14), one from D. C. Thomas, Sheriff of Jefferson County, Georgia, to said Jefferson County, dated July 9, 1928, and without explanation withheld from the record until August 18, 1942, when it was then recorded in the Clerk's Office of said County, in Book VV of Deeds at page 118 (Transcript, 97), purporting to convey petitioner's two unimproved adjoining lots, situated in the City of Wadley, Jefferson County, Georgia, comprising 1½ acres, of the value of $4,000 (Transcript, 75), for a recited consideration of $40.00 (Transcript, pp. 4, 93), and the other deed from said Jefferson County, by its County Commissioners, to School District No. 2 of said County, dated January 1, 1930, and also without explanation withheld from the record until July 12, 1939, when it was then recorded in Deed Book 3-C, page 560, for a recited consideration of $45.00, conveying the lots of land above referred to (Transcript p. 97).

V

The deed from D. C. Thomas, Sheriff, as aforesaid, to said Jefferson County, above referred to, was void on its face by reason of the following (Transcript, pp. 6-8):

(a) The levy of the tax *fi. fa.*, the basis of said deed, was excessive, in that said land was capable of being divided into lots and sold separately, or a lot could have been carved therefrom and sold for a sum in excess of the taxes amounting to $22.20.

(b) Said tax *fi. fa.* was issued not against the petitioner, the owner of the land, but against one M. B. Salter, who was not, and who never was the owner of said land.

(c) Petitioner was a non-resident of the State of Georgia, had no prior notice of said levy and sale; that not having

returned the land for taxation for the year 1927, under section 92-8103 of the Code of Georgia, Annotated, the land should have been advertised for sale for 90 days in the official gazette of said county, if rental or hiring would not produce the amount of such taxes; the sale thereof having been advertised in the News & Farmer, the official gazette of said county, *only once a week for four successive weeks* during the month of June, 1928; said advertisement offering the land for sale on the first Tuesday in July, 1928, as the property of *M. B. Smith* whereas said deed contains the recital that said land was sold on the 9th day of July, 1928 (an illegal sales day), the first Tuesday in July in 1928 having fallen on July 2 (Transcript, p. 151).

(d) The Notice required under secs. 92-6212 and 92-6213 of the Code of Georgia, Annotated, to be given by the tax collector of the amount of taxes due, was not given to petitioner nor to her representative, although her ownership of said land was well known.

(e) Said advertisement of sale did not set forth the amount of the tax assessed.

(f) The said land was advertised as the land of M. B. Smith, who had no interest therein, it being owned by the petitioner, Mattie L. Smith.

(g) The said land could have been rented and said taxes paid therefrom, as provided by section 92-8103 of the Code of Georgia, Annotated.

(h) Said execution failed to state said property was unreturned in violation of section 92-8103 of the Code of Georgia, Annotated.

(i) No notice of a tax assessment for 1927 or 1928 against said property was ever given petitioner as required by law.

(j) The taking of petitioner's land under said tax deed was without due process of law in violation of the due

process clause of the Fourteenth Amendment to the Constitution of the United States (Transcript, p. 8).

VI

On the first Wednesday in November, 1929, when petitioner's husband learned of the purported sale of her land to the said Jefferson County, he, accompanied by counsel, appeared before the Board of Commissioners of said county and offered to pay all taxes, interest, cost, or other lawful charges, against said land, and to redeem such land, which payment the commissioners refused to accept (Transcript, p. 79).

VII

The deed of conveyance to School District No. 2 of said county, above referred to, is void for the following reasons (Transcript, p. 10):

(a) Said county of Jefferson acquired no title to the land in question, and, therefore, had no title to pass.

(b) No resolution was adopted by the said Board of Commissioners, authorizing the execution of said conveyance; and

(c) No commissioner was appointed by said board to sell said land, as required by the law of Georgia prior to 1935 (173 Ga. 499) (Transcript 10).

VIII

On August 24, 1942, immediately after her discovery of said deeds, petitioner, through her attorney, erected a fence around said unimproved tract of land, whereupon S. W. Overstreet a county commissioner, had said attorney arrested therefor and had said fence torn down (Transcript, p. 72).

WHEREFORE, petitioner respectfully prays that upon a rehearing and reconsideration of the application of your petitioner for the allowance of the writ of certiorari that such writ issue out of and under the seal of this Honorable Court directed to the Supreme Court of Georgia, commanding said Court to certify and send to this Court a transcript of the record and of all proceedings in this case (same being entitled *Mrs. Mattie L. Smith* v. *Jefferson County et al.*, No. 15601 on the docket of said Supreme Court of Georgia) to the end that the record and proceedings therein be reviewed by this Honorable Court and the judgment of said Court be reversed, with directions to the Supreme Court of Georgia to remand said cause to the Superior Court of Jefferson County, Georgia, to set aside the judgment therein entered in the aforesaid case, and grant your petitioner a new trial, or for such further proceedings not inconsistent with the opinion and judgment of this Honorable Court, and for such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

MRS. MATTIE L. SMITH,
By LEVI H. DAVID,
Bond Building,
Washington, D. C.,
Petitioner's Attorney.

May 20, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1096

MRS. MATTIE L. SMITH,

Appellant,

vs.

JEFFERSON COUNTY, GEORGIA, ETC., ET AL.,

Appellees

ON REHEARING FOR ALLOWANCE OF WRIT OF CERTIORARI TO REVIEW FINAL JUDGMENT OF THE SUPREME COURT OF GEORGIA

BRIEF IN SUPPORT OF PETITION

I

Opinion of Court Below

The opinion of the Supreme Court of Georgia is contained in the record herein, and also in the printed "Statement as to Jurisdiction" at pages 5 to 12, inclusive.

II

Jurisdiction

The petitioner respectfully invites the attention of the Court to the petition, to which this Brief is attached, as to

the jurisdiction of this Honorable Court to grant the writ of certiorari to the Supreme Court of Georgia.

III

Specification of Errors

The Supreme Court of Georgia erred in the following particulars:

1. In holding that even should it be assumed that the deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, conveying petitioner's land, was based upon a void *fi. fa.* and that such *fi. fa.* amounted to no execution at all, such deed was good as color of title.

2. In not holding that the void deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, based upon a void *fi. fa.*, constituted no color of title and did not start the running of the statute of limitations, and in not holding that the taking of petitioner's land under the void deed resulted in the violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. In not holding, in accordance with decisions of the Supreme Court of the United States (hereinafter cited) that possession under the void deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, based upon the void execution for taxes against petitioner's land, constituted no color of title sufficient to start the running of the statute of limitations.

4. In not holding that neither the deed of the Sheriff of Jefferson County, Georgia, to said Jefferson County, nor the deed of said Jefferson County to School District No. 2, passed any title to petitioner's land sufficient in law to constitute color of title to start the running of the statute of limitations.

5. In deciding that each of the said deeds based upon a void execution for taxes against petitioner's land, justified in law color of title sufficient to start the running of the statute of limitations from the date of the Sheriff's void deed, such decision being in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

Argument

By the specification of errors the petitioner contends that the ruling of the Supreme Court of Georgia in holding that although the tax deed from the Sheriff of Jefferson County, Georgia, to said County, and the deed from said County to School District No. 2 of said County, were void, nevertheless, each of said void deeds created "color of title" sufficient in law to start the running of the short seven- years' statute of adverse possession, was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

It is submitted that under decisions of this Court the possession by one under a void deed does not create color of title which is protected by the statue of limitations.

Parker v. *Rule's Lessee,* 9 Cranch, 64 (1815)
Walker v. *Turner,* 9 Wheaton, 541, 552 (1824)
Moore v. *Brown,* 11 Howard, 414, 425 (1850)
Redfield v. *Parks,* 132 U. S. 239, 250, 251 (1889)

In *Redfield* v. *Parks, supra,* the Court says (p. 250):

> "We think it very clear that the judge was correct in holding this tax deed to be void. It was not merely void by extrinsic facts shown to defeat it, but was absolutely void on its face. But we think that the court erred in holding that such an instrument could create color of title which would bring the case within the foregoing statute of limitations.

"The case of Moore v. Brown, 11 How. 414, brought the question before this court. The court says, p. 425:

> " 'It is disclosed upon the face of the deed that the auditor sold the land short of the time prescribed by the act. It was not, then, a sale according to law. That must have been as well known by the purchaser as it was by the auditor.' "

"After a somewhat elaborate opinion it was certified to the Circuit Court, from which the case had come by division of opinion, 'that the paper offered in evidence by the defendant is a void deed upon the face of it, and was not admissible as evidence for the purpose for which it was offered,'—which was to support the possession under the statute of limitations."

The Court cites a number of State decisions similarly holding that possession under a void deed creates no color of title to sustain adverse possession.

In the instant case, petitioner emphasizes the fact that the writ of execution commanded the Sheriffs, Deputy Sheriffs or Constables of Jefferson County, Georgia, out of the goods and chattels, if any be found, otherwise of the lands and tenements of M. B. SALTER (not the owner of the land, Mrs. Mattie L. Smith) by levy and sale thereof to enforce the collection of the taxes, in the sum of $22.20, with interest. And the two lots of the petitioner, a non-resident of Georgia, without notice, valued at $4,000 were sold by the Sheriff to the County of Jefferson for $40.00. No return was made as to personal property of the petitioner.

In *Stead's Executors* v. *Course,* 4 Cranch, 403, Chief Justice Marshall rendered the opinion of the Court. At page 414, the Court says:

> "In examining the law under which this sale was made, the court perceives that the collector is authorized to sell land only on the deficiency of personal estate; and then to sell only so much as is necessary,

to pay the tax in arrear. In this case a sale is made of a whole tract of land, without specifying the amount of taxes actually due for which that land was liable and could be sold. This is proceeding in a manner not strictly regular. The sale ought to have been of so much of the land as would satisfy the tax in arrear. Should it be true that the land was actually liable for the whole sum for which it sold, it would still be incumbent on the vendee to prove that fact; for it cannot be presumed. Every presumption, arising from the testimony in the cause, is against it.

"Had this fact been established, the court is inclined to think that the circumstances of the case as stated, though not perhaps amounting to proof of fraud, afford such presumptions as would render a final decree, without further testimony, unsatisfactory, and that an issue ought to have been directed, on the question whether the sale was fraudulent or not. But if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority, and the plea cannot be sustained."

In the above case, the judgment of the circuit court of the United States for the District of Georgia was reversed. Compare *Wetmore* v. *Karrick,* 205 U. S. 141.

Where a statute required the delinquent list to contain a statement of the amount of taxes due on each parcel of land, an omission or error in such statement is generally held to be a fatal defect. *Goodrich* v. *Darr,* 161 Ark. 514; *California L. & T. Co.* v. *Weis,* 118 Cal. 489; *Mann* v. *People,* 102 Ill. 346. Illustrative of the strictness of the rule requiring conformity to the statute authorizing sale of the owner's real estate for delinquent taxes, it was held in *Warden* v. *Broome,* 9 Cal. App. 172, where the statement of the amount of taxes, penalties and costs set forth the amount as $19.90, whereas the correct amount was $19.40, the court held the tax sale void.

In *Kann* v. *King*, 25 U. S. Court of Appeals, D. C., 182, 183, the court held that the statutes regulating the matter of sales of real estate for non-payment of taxes must be strictly pursued, in order to devest title from the owner. (This case was reversed on other grounds, 204 U. S. 43).

In *Davis* v. *Seybold*, 195 Fed. 409, the court held that where invalidity appeared on the face of the deed, possession under the deed cannot be made the foundation of color of title to enable the grantee to claim the benefit of an adverse holding.

In *Arrowsmith* v. *Burlingim*, 1 American Law J. (N. S.) 448, 1 Fed. Cases 1187, the court held that possession without color of title amounts to nothing and that to render an Auditor's deed as evidence of title to land sold for taxes under the law, it must be first shown that the requirements of the law have been complied with, and that the statute of Illinois to quiet possession and confirm titles to land is not a limitation law, but the court held that it is a legislative conveyance and an adjudication of one man's land to another, therefore such an act is unconstitutional.

In *Cook* v. *Lasher*, 73 Fed. [illegible], the court held that a delay of a land owner in bringing a suit to annul a tax deed, which is void for failure to comply with the requirements of the statute, and which consequently does not affect his title, is not imputable to him as laches.

Wherefore, it is respectfully submitted that the writ of certiorari should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1096

MRS. MATTIE L. SMITH,

Appellant,

vs.

JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF COMMISSIONERS OF ROADS AND REVENUES; J. E. BARROW, CLARENCE HENDERSON, AND SCHOOL DISTRICT No. 2 OF JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF TRUSTEES, F. T. McELREATH, W. D. EVANS, S. W. OVERSTREET AND J. W. FUTRAL, AND T. H. RIVERS AS TAX COLLECTOR OF JEFFERSON COUNTY, GEORGIA, AND JAMES HUBBARD AS SHERIFF OF JEFFERSON COUNTY, GEORGIA,

Appellees

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

Because of the fact that the motion for a rehearing suggests a different basis of jurisdiction of the Supreme Court from that asserted in the original appeal, and because of the fact that the motion for a rehearing unintentionally misstates the record in certain respects, we respectfully present this brief and argument in opposition to the motion.

I

In Section I of the motion for a rehearing petitioner invokes the jurisdiction of this Court to grant the writ of certiorari under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Title 28, U. S. C. A. Section 347(a). It is respectfully suggested that the section referred to has no application whatever to a case in a State Court. The section referred to confers jurisdiction on the Supreme Court of the United States to grant certiorari from Federal Circuit Courts of Appeals and the Court of Appeals of the District of Columbia. The only authority for a case to be taken to the Supreme Court of the United States from the highest Court of the State is embraced in Section 237 of the Judicial Court as amended, 28 U. S. C. A. Section 344. The Supreme Court of the United States will review the decision of the State Court only in cases falling strictly within the terms of this last Code Section, that is to say where a federal question is necessarily and directly involved. It is hardly necessary to cite authorities for this proposition, the same being quoted in great numbers in Section 4 of the note following Code Section 28-344 above referred to.

II

Since counsel for the appellant is mistaken as to this new basis for jurisdiction, his motion and brief add nothing to the original appeal and suggest no new reason why the Court should grant a rehearing. The authorities cited in the motion to dismiss filed by counsel for appellees are directly in point, and the motion for a rehearing suggests no reason why the Court should reconsider its decision dismissing the appeal.

Each one of the decisions of the Supreme Court of the United States cited in the brief attached to the motion for

rehearing is a case arising in a Federal Court, in which the trial court was interpreting the law of various states, and in which the Supreme Court was reviewing the correctness of the trial court's interpretation of the law of the State involved. These authorities have no application to the case at bar, in which the Supreme Court of the United States will not go into any question of the State law, but will assume jurisdiction only on the basis of federal questions. Nor would decisions interpreting the statutes of other states be very helpful in interpreting the Georgia statutes. Nor is there anything in the decisions cited in conflict with the decision in the Supreme Court of Georgia in the case at bar.

III

Since the suggestion involved in same is quite prejudicial, attention is called to the fact that counsel for appellant unintentionally misstates the record in Section IV of his brief where he says that the deed from D. C. Thomas, Sheriff, to Jefferson County, dated July 9, 1928, was "without explanation withheld from the record until August 18, 1942, when it was then recorded in the Clerk's Office of said County in Book VV of Deeds at page 118". It will be noted that the record states that the deed was recorded August 18, 1928, but that the Clerk's certificate to the certified copy introduced by appellant states that it was recorded August 18, 1942. This manifest typographical error was cleared up by the original record which was introduced in evidence by the appellees, and which showed the deed actually recorded August 18, 1928. This evidence and statement clearing up the question appears on page 106 of the original record in the Supreme Court of Georgia. Unfortunately we do not have before us the printed record in the Supreme Court of the United States and cannot cite the page there, but it appears near the

end of the transcript of the evidence introduced in the case.

It will be further noted that the statements of counsel in his summary of the case are statements of the contentions of the appellant in the case and not statements of fact as found by the trial court or the Supreme Court of Georgia. While the Supreme Court of Georgia held that the deed would be good as color of title even if void, the Supreme Court of Georgia states that it does not find the deed void, and cites certain authorities suggesting its view that the deed was not void.

Respectfully submitted,

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